

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

TIMOTHY TORRENCE,

Plaintiff,

v.

Civ. No. 18-934 KG/SCY

NANCY A. BERRYHILL, *Acting  
Commissioner of Social Security Administration,*

Defendant.

**PROPOSED FINDINGS AND RECOMMENDED DISPOSITION REGARDING  
PLAINTIFF'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

**THIS MATTER** is before the Court on Plaintiff's Second<sup>1</sup> Application to Proceed in District Court Without Prepaying Fees or Costs, filed November 6, 2018. Doc. 9. The Court may authorize the commencement of any suit without prepayment of fees by a person if he (1) submits an affidavit that includes a statement of all assets he possesses and (2) is unable to pay such fees. 28 U.S.C. § 1915(a). In determining whether a movant is unable to pay within the meaning of § 1915, the Tenth Circuit has indicated that "[o]ne need not be absolutely destitute to proceed IFP." *Lewis v. Ctr. Mkt.*, 378 F. App'x 780, 785 (10th Cir. 2010) (unpublished). Nevertheless, a motion to proceed in forma pauperis may properly be denied if the movant can pay the required fees and still support and provide necessities for himself and any dependents. *Id.*

In his affidavit, Plaintiff states that: (i) he receives disability payments totaling \$2,972.00 each month; (ii) his expenses total \$2512.00<sup>2</sup>; and (iii) he has \$4 in cash. Thus, it appears that

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<sup>1</sup> Plaintiff initially filed a motion to proceed *in forma pauperis* on October 5, 2018. Doc. 2. The Court held a telephonic hearing on that motion on October 17, 2018. *See* Docs. 4, 5. During the hearing, the Court addressed issues it had regarding Plaintiff's affidavit and directed Plaintiff to either withdraw the motion or file an amended motion no later than October 26, 2018. Doc. 5. Plaintiff sought two extensions of time to file his amended motion, *see* Docs. 6 and 7, and thereafter filed the second motion that is now before the Court.

<sup>2</sup> The Court calculated Plaintiff's total monthly expenses based on the listed individual itemized expenses. The Court's calculation differs slightly from the number Plaintiff calculated. Doc. 9 at 5 (calculating \$2452 total).

Plaintiff is able to pay the \$400.00 filing fee for instituting a new case because his monthly income exceeds his monthly expenses. *See Brewer v. City of Overland Park Police Dep't*, 24 F. App'x 977, 979 (10th Cir. 2002) (litigant whose monthly income exceeded his monthly expenses by a few hundred dollars appeared to have sufficient income to pay filing fees and thus was not entitled to IFP status) (unpublished). Additionally, although Plaintiff does not identify his household size in his affidavit, his annual income of \$35,664.00 exceeds the 2018 federal poverty level for households of at least six members according to the United States Department of Health and Human Services.<sup>3</sup> Plaintiff's annual income also exceeds New Mexico's per capita income.<sup>4</sup> Lastly, Plaintiff reports spending \$100.00 per month on recreation and entertainment. *See* Doc. 9 at 4. Plaintiff offers no explanation of why he cannot direct this discretionary spending toward the payment of the filing fee in this case.

In sum, Plaintiff's affidavit fails to demonstrate that he meets the indigency requirement for proceeding without prepayment of fees or costs. Therefore, I recommend DENYING Plaintiff's motion.

  
UNITED STATES MAGISTRATE JUDGE

**THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**

<sup>3</sup> *See* Office of the Assistant Sec'y for Planning & Evaluation, *2018 Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://aspe.hhs.gov/poverty-guidelines> (last visited December 17, 2018).

<sup>4</sup> *See* United States Census Bureau, *New Mexico Quick Facts*, U.S. DEP'T OF COMMERCE, <https://www.census.gov/quickfacts/fact/table/nm/INC110217#INC110217> (last visited December 17, 2018)